Supreme Court, U. S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1977

No. 77-254

DISCOUNT COMPANY, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court Review

Petition Filed:

Termination—Default—Failure to Make Adequate Progress—Ruling Below (Ct. Cl., 680 FCR B-3): In view of a construction contractor's demonstrated lack of diligence, the Government was justified in terminating the contract for default. Despite repeated inquiries by the contracting officer and the issuance of a ten day cure notice, the contractor neither began "more than piddling" construction activity nor assured the Government that it could meet the completion deadline. The contractor's failure to make progress was not excused by the parties' dispute over suitable borrow material; the material at the initial site was not so unsuitable as to make performance impossible, and the contractor therefore had a duty to continue performance during the processing of its claim. Moreover, the default termination did not require a finding that completion within the contract's time limits was impossible. Rather, default termination was appropriate if a demonstrated lack of diligence indicated that the Government could not be assured of timely completion. That lack of diligence was clearly demonstrated here.

Questions presented: (1)Did the Court of Claims err in deciding that the contractor was required to proceed under a proposed bilateral change order? (2) Did the Court of Claims err in refusing to consider the whithholding of progress payments from a small contractor for a period of ten months as jutification for any lack of progress in completing the contract?

(3) Has the Court of Claims erred in declaring that a contractor may be default terminated for failure to make adequate progress when it is conceded that sufficient time remained for timely completion? (4) Did the courts findings of fact so substantially deviate from the accepted course of judicial proceedings as to justify an exercise of the Supreme Court's supervisory powers? (Discount Company, Inc. v. U.S., Sup. Ct. No. 77-254, petition filed, 8/15/77).

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DISCOUNT COMPANY, INC.,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Discount Company, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Claims entered in this proceeding on April 20, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims, as yet unreported, appears in Appendix to

This Petition. The opinion of the Department of Agricultural Board of Contract Appeals may be found at AGBCA No. 273, 74-2 BCA ¶10,775, and also appears in the Appendix to this Petition.

JURISDICTION

The Order and Judgment of the United States Court of Claims was entered on April 20, 1977, which rehearing was denied on May 27, 1977. This Petition for Certiorari was filed within the period of time prescribed by 28 U.S.C. §2101 (C). The jurisdiction of this Court is invoked under 28 U.S.C. §1255 (1).

QUESTIONS PRESENTED

(1) Has the Court of Claims erroneously decided a substantial question of federal contract law, not yet considered by this Court, in requiring a government contractor to proceed under a proposed bilateral change order?

(2) Did the Court of Claims erroneously answer a substantial question of federal contract law, not yet considered by this Court, in refusing to consider the withholding of progress payments from a small government contractor for a period of ten months as justification for any lack of progress in completing this contract?

(3) Has the Court of Claims erred in deciding a substantial question of federal contract law, which should be decided by this Court in declaring that a contractor may be default terminated for failure to make adequate progress to assure completion when all parties and the Courts below readily concede that sufficient time remained for timely completion?

(4) Did the findings of fact of the Court of Claims so substantially deviate from the accepted and usual course of judicial proceedings as to justify an exercise of this Court's supervisory powers?

STATEMENT OF FACTS

The Forest Service of the United States Department of Agriculture awarded Contract No. 002112 to Discount on May 20, 1968, for construction of Mona Campground and Lookout Boating Site in the Willamette National Forest. This involved four main subprojects - the boat ramp, the boat ramp parking lot, the campground units and road, and the water system. The first three subprojects required significant amounts of borrow (fill material), to be provided from a borrow pit supplied by the government.

Shortly after the initial commencement of work, a dispute arose as to the suitability of material encountered in the borrow pit. Throughout the 1968 work season, Discount continued construction using the borrow pit, and pursued its remedy under the disputes clause. Ultimately, subsequent to Discount's termination, an equitable adjustment was made.

Construction was discontinued for the winter season in October of 1968. In the prime work season, during the spring of 1969, when fire dangers are minimal, the government refused to allow Discount to resume construction. Instead, it allowed a contractor to work in the area to remove timber cut by Discount the prior season. During this entire time, the Corps of Engineers was raising the reservoir water level.

Finally, in May of 1969, pre-work conferences were held between officials of Discount and the government. Substantial restaking was necessary due to the logger's use of the area, campground redesign as embodied in Change Order No. 4, and normal deterioration and loss over the winter. Discount agreed to allow the government until June 2nd to complete the staking so that the need for overtime work would be avoided. On June 2nd, the government submitted a partial resumption order and a proposed bilateral change order designating a new borrow site, together with terms for its use, since the original site was by this point in time submerged by rising water and unusable. Because the government had failed to complete the staking, however, Discount was unable to resume work until at least June 25, when the government finally claimed completion of the staking.

A dispute had arisen during the 1968 work season concerning Discount's methods of construction at the boat ramp and parking lot. It had, therefore, in October 1968, withheld Progress Payment No. 6 for work performed. In spite of knowledge of Discount's financial difficulties in paying subcontractors and payroll taxes, the government continued to withhold all funds throughout the time of Discount's ultimate termination in August of 1969. Anticipating resolution of the dispute, and relying on the government's promises to renew payments, Discount had indicated at the prework conferences its intent not to resume work at the boat ramp and parking lot until September, when the water level was expected to recede. When the progress payment did not materialize, Discount's first efforts were directed toward conforming the boat site and parking lot to the contracting officer's oral specifications,

so that the pay invoice could no longer be withheld under pretense of non-conformity. The government immediately issued a Stop Work Order, and shortly thereafter issued a unilateral change order accepting the work "as is". Still, the Progress Payment was not issued.

On July 15, the government issued a full resumption work order, specifically accepting work on the boat ramp and parking area. In effect, Discount was ordered to resume work on the campground and water system, the only other areas of construction. Because of the many government caused delays, Discount's plumbing subcontractor was busy on another project and not immediately available to resume work. Thus, until August 4, Discount was unable to resume work on the water system.

As noted above, the campground work required significant amounts of borrow, and the original borrow was under water. Change Order No. 3, designed to provide an alternate borrow site for use at the campground, had never been implemented. While it had originally been submitted as a proposed bilateral amendment on June 2, it was unacceptable as written, and was returned on June 10, and remained in the government's hands until August 4. By letters of June 11 and 30, as well as orally on other occasions, Discount expressed the unacceptability of the proposed bilateral change order, and requested resubmission with acceptable terms. Because the government refused to submit an acceptable bilateral change order, or exercise its contractual right to impose a unilateral change order, the site was never available to Discount except in the status of a volunteer.

Furthermore, during this period, the government was also in the process of materially redesigning the campground, as disclosed by Change Order No. 4. These changes required significantly more borrow. Discount notified the government of the necessity of an on-site review of the changes prior to resumption of work on the campground, yet COAR Roth refused such a review during the pendency of the cure period, finally conducting the review on August 4, one day after the cure period had expired.

In spite of the lack of borrow for resumption of work on the campground, and in spite of the obvious and communicated impossibility of resumption on the water system while Discount's subcontractor was completing another project, a cure notice was sent by the contracting officer on July 23, only eight days after the full resumption work order was issued.

On July 29 and 31, Discount's president met with the COAR and COR concerning Pay Invoice No. 6 and Change Order No. 4, and the pay estimate was agreed upon, and the government promised to process the payment and to deliver it on August 4.

On August 4, work on the water system was resumed to the full extent practicable and consistent with the quality controls contained in the contract. The government finally gave the on-site review necessary to implement Change Order No. 4. Revised Change Order No. 3, again in proposed bilateral form, was submitted for "approval or disapproval". Pay Estimate No. 6 was formally accepted, yet never processed, nor was payment for work completed in 1968 delivered as promised.

Work continued diligently after August 4 on the waterline. The campground work was not resumed because of continuing problems with proposed bilateral Change Order No. 3, the refusal to process Pay Estimate No. 6 as promised, and the fire danger.

On August 12, Discount was terminated from the project.

By letter of August 22, 1969, Petitioner submitted Notice of Appeal of the contracting officer's decision to terminate Petitioner by default. Petitioner appealed an unfavorable decision of the Board of Contract Appeals, and was granted summary judgment by Trial Court Judge Brown. The decision of the Trial Judge, adopted in toto by Judge Kunzig's dissent, was reversed by the three-member panel of the Court of Claims, which denied Petitioner's Petition for Rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

THE COURT OF CLAIMS ERRONEOUSLY DECIDED A SUBSTANTIAL QUESTION OF FEDERAL CONTRACT LAW NOT YET CONSIDERED BY THIS COURT IN REQUIRING A GOVERNMENT CONTRACTOR TO PROCEED UNDER A PROPOSED, BILATERAL CHANGE ORDER.

The United States Government is by far the largest consumer in the nation. A significant portion of that consumption is governed by federal contracts, which include standard clauses dealing with changes and disputes. Thus, the very magnitude of procurement involved and the pervasity of these standard clauses suggests the profound impact of the decision of the Court of Claims, and the response of this Court.

Government contracts have long included a standard Changes Clause, which allows the government the needed flexibility and power to unilaterally impose any modification within the scope of the original contract. Fundamental principles of offer and acceptance, and a meeting of the minds, required the development of such a clause to avoid the necessity of a separate agreement and consideration for every contract modification.

As a counterbalance to the Changes Clause, a standard Disputes Clause developed which sought to protect the contractor when the government exercised its power under the Changes Clause. Thus, the Disputes Clause permits the contractor to pursue administratively a claim for equitable adjustment whenever a change is unilaterally imposed.

Because the power granted by the Changes Clause was easy to exercise, its use grew rapidly. The contractors' responsive resort to the Disputes Clause, however, provided a dampening effect on the unfettered use of these unilateral impositions. The uncertainties in fiscal management, the administrative costs and delay involved in the disputes process became unacceptable.

In the evolutionary stage of things, this contract was performed under a new policy of procuring agencies which sought to avoid the unacceptable uncertainties and expense of resort to the Disputes Clause. Procuring agencies began to restrict their use of the power granted in the Changes Clause. Bilateral changes were sought which would provide the necessary meeting of the minds, the necessary offer and acceptance requisite to modify a contract without resort to the power of the Changes Clause, and thus the remedies of the Disputes Clause.

In the instant contract, of five change orders submitted prior to Petitioner's termination, four were bilateral in nature. Indeed, the standard change order form is designed as a bilateral, self-supporting document, a separate contract amending the original contract. It discloses that all changes listed are merely proposals; that it is not binding on the government until accepted and signed by the contracting officer, and that the contracting officer's signature constitutes acceptance as to the work to be performed, prices to be paid, and contract time as shown on the order.

Throughout the proceeding below, it has been implicitly, if not explicitly, recognized that the government was obligated to provide a borrow source before work could resume on the campground. The Board spend most of its opinion discussing the prior year's borrow problems, irrelevant to a consideration of the 1969 work season since the original source was flooded in 1969 by the Corps of Engineers. The Court of Claims merely concluded that a borrow site was made available by reason of Change Order No. 3. This is the conclusion we question here.

Change Order No. 3 was originally submitted on June 2, 1969. It was not acceptable as written, and was returned unsigned. During June, Petitioner sent numerous letters to the government requestion resubmission on acceptable terms, and, in fact, it appears that negotiations for its acceptance continued up until late July. On August 4, after the alleged cure period had expired, and under the threat of default termination, the government finally resubmitted the Change Order, again in the form of a proposed

bilateral change. It was submitted for Petitioner's approval or disapproval, and, by its terms, not binding on the government until accepted and signed by the contracting officer.

The Court of Claims failed to recognize the current policy preferring bilateral changes over resort to the power of the Changes Clause. The Court of Claims ignored the clear and unambiguous language of the change order itself, which revealed its bilateral nature. The Court of Claims ignored Petitioner's previous experience in a concurrent government contract involving the same government officers, the same forms, and the same policies in which Petitioner performed under a similar proposed bilateral change order and was denied compensation because the contracting officer had not signed the change order.

Instead, the Court of Claims declared that Petitioner's position that Change Order No. 3 was not a part of the contract, and that, therefore, no borrow site was available, was a hypertechnical contention, an afterthought, and not based on the realities of the situation. Petitioner earnestly contends that its position is not hypertechnical, but based on fundamental principles of contract law. It is not an afterthought, as revealed by the many letters and oral requests evident in the record requesting resubmission and disclosed the continuing negotiations for acceptance. It is not wholly divorced from the realities of the situation, but, instead, fully justified and understandable when the experiences of the contractor with this government agency and these government officers is considered. The government simply chose not to exercise its power in connection with Change Order No. 3.

The government was fully aware of its power under the Changes Clause, and the procedure for its implementation. Indeed, Change Order No. 5 was such a unilateral imposition.

The error of the Court of Claims, and the necessity for its reversal, can be quickly summarized. The government submitted a proposed bilateral change. The Court of Claims concluded that, if unacceptable to the contractor, he had the right to consider it as unilateral change under the Changes Clause, and to proceed thereunder and resort to the Disputes Clause. This is contrary to fundamental principles of contract law. It is contrary to the policy of procuring agencies to attempt to negotiate bilateral changes before resorting to the power of the Changes Clause with the accompanying uncertainty and expense of the Disputes Clause.

The decision of the Court of Claims in this particular constitutes plain error of potentially devastating impact on the integrity and smooth functioning of government procurement policies. This Court should grant certiorari to consider this issue.

THE COURT OF CLAIMS ERRONEOUSLY ANSWERED A SUBSTANTIAL QUESTION OF FEDERAL CONTRACT LAW, NOT YET CONSIDERED BY THIS COURT, IN REFUSING TO CONSIDER THE WITHHOLDING OF PROGRESS PAYMENTS FROM A SMALL GOVERNMENT CONTRACTOR FOR A PERIOD OF TEN MONTHS AS JUSTIFICATION FOR ANY LACK OF PROGRESS IN COMPLETING THIS CONTRACT.

Work on the Mona Campground and Lookout

Boating Site terminated for the season in October of 1968, due to weather conditions. It is undisputed that no borrow payments were made prior to termination some ten months later, in spite of promises by the government, and the government's knowledge of Petitioner's financial difficulties in meeting federal withholding tax payments and payments due subcontractors. The government suggests, and the Court of Claims accepted, two explanations for its failure to make any payments during this period - the alleged non-conformity of the boat ramp, and the assumption of a stakeholder position.

There was a bona fide dispute concerning the methods required and used in the construction of the boat ramp. But any reliance on this dispute for justification in withholding all funds is misplaced. At best, only those funds due on the boat ramp, or an amount necessary to correct any deficiencies, should have been withheld. But more importantly, the dispute provided no excuse whatsoever after the ramp was accepted on July 15.

In reliance on its alternate theory that it had assumed a stakeholder position, the government relied on Argonaut Insurance Co. v. U.S., 193 Ct Cl 483, 434 F2d 1362 (1970), and Home Indemnity Co. v. U.S., 180 Ct Cl 173, 376 F2d 890 (1967). Argonaut presented a case of bankruptcy, and Home Indemnity one of clear and material breach. Neither situation was present here, and the government was not justified in withholding money, allegedly for the benefit of the surety. It should be noted that the surety was not concerned about any potential inability to timely perform or losses it might incur which would suggest a justification

for protection by the government. Indeed, only three years prior to the instant contract, it had failed in its claim against the government for not assuming a stakeholder position because it had failed to request the withholding of funds due. United Pacific Insurance Co. v. U.S., 176 Ct Cl 176 (1966). The surety here would certainly have made vigorous requests that the government assume a stakeholder position had there been any basis for such an action.

This voluntary assumption of a stakeholder position cannot be countenanced by this Court. To withhold almost $11,000.00 on a $104,000.00 contract with a small government contractor is clearly coercive in nature, and totally without justification. The impact of such tactics is apparent. To allow the withholding for ten months of substantial funds due a small government contractor is an extremely dangerous precedent. This Court should grant certiorari to consider this question of substantial importance.

THE COURT ERRED IN DECIDING A SUBSTANTIAL QUESTION OF FEDERAL CONTRACT LAW, WHICH SHOULD BE DECIDED BY THIS COURT, IN DECLARING THAT A CONTRACTOR MAY BE DEFAULT TERMINATED FOR FAILURE TO MAKE ADEQUATE PROGRESS TO ASSURE COMPLETION WHEN ALL PARTIES, AND THE COURT BELOW, READILY CONCEDE THAT SUFFICIENT TIME REMAINED FOR TIMELY COMPLETION.

Most government contracts contain a clause allowing termination where sufficient progress is not made to assure completion. It appears that this Court has never had the occasion to consider the

construction of this cause, and give guideance to government contractors, procurement agencies, and the courts below. Petitioner suggests that the instant case provides an opportunity for such consideration and guideance. The only ground asserted for default termination was insufficient progress to assure completion.

All parties, and the Board below, expressly recognized that adequate time remained under the contract for its timely completion. And, although the Court of Claims characterizes Petitioner's work during 1969, and particularly after August 4 as "piddling", it is undisputed on the record that from August 4 until termination Petitioner was working on the only area he considered available, and at the maximum speed consistent with the government's own quality standards and time consuming testing procedures.

Petitioner believes that the Court of Claims has erroneously extended the rules of Universal Fiberglass Co. v. U.S., 210 Ct Cl , 537 F2d 393 (1976), and American Dredging Co., ENG BCA 2920, 72-1 BCA §9316, Aff'd 207 Ct Cl 1010 (1975). Universal Fiberglass dealt with a situation of total impossibility of performance. The contract called for construction of mail trucks, but the contractor was so far behind in his delivery schedule, had allowed his work force to totally dissipate, and was totally unable to obtain the parts and equipment necessary for completion of the contract so that timely performance was impossible. Here, however, Petitioner had a work force and ready, willing and able subcontractors. It was impossible, however, to mobilize and coordinate all these workmen on short notice, and subcontractors were finishing other contracts

entered into when the government had issued its Stop Work Order on July 2. Similarly, the necessary machinery and materials were either on the site or readily available. All that was necessary for timely completion was a borrow source and progress payments as promised.

American Dredging dealt with a similar total inability to perform timely due to the contractor's own substantial mistakes. Total and immediate mobilization was necessary for any hope of even near timely completion. Such was not the situation here. More than adequate time remained. Any delays were of the government's own making in refusing access in the spring of 1969, in failing to adequately restake the site after the winter season, in flooding the original borrow site and failing to provide another, in refusing to issue burning permits, and in refusing to process progress payments.

Petitioner earnestly submits that the decisions of the courts below disclose a need for directions from this Court in the proper construction of the "sufficient progress to assure completion" language so prevalent in government contracts. Petitioner earnestly suggests that the decision below, in upholding Petitioner's default termination solely for insufficient progress, and in spite of an admitted ability to timely perform, must be cricically examined and reversed.

THE FINDINGS OF FACT OF THE COURT OF CLAIMS SO SUBSTANTIALLY DEVIATED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO JUSTIFY AND EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Court of Claims, in its opinion, found .....

> "the remaining borrow material needed for the 1969 campground construction could readily have been taken from the alternate site designated early that June. The Plaintiff's only answer is that it rejected this proposed change order, and was never officially ordered to use the alternate site. Discount's objection was not that the new borrow was unuseable - on the contrary, it is quite clear that it was adequate - but that the change order should include an upward, equitable adjustment because of higher transportation costs."

Here, the Court of Claims ignores the uncontradicted and unequivocal testimony of Discount that the proposed alternate site appeared to be unusable, and the uncontradicted testimony that the completing contractor found the said proposed alternate site unusable. This question of fact was a critical link in rationalizing the Forest Service' position that Discount failed to perform without justification.

The record clearly shows that it was necessary to provide a second alternate site, and that that site was never made available to Discount prior to termination. First, up to the time of Discount's termination, negotiations were continuing on the first alternate borrow site, and the second alternate borrow site was not yet designated. Secondly, the second alternate borrow site

was under water at the time of termination, and was, therefore, unavailable until the water level was lowered by the government later that fall.

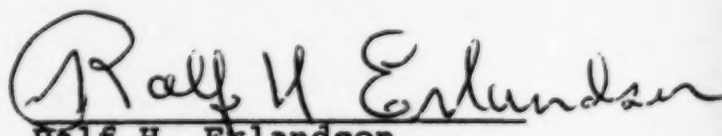
While Petitioner's claim that the Court below made grossly erroneous findings of fact is not in itself a unique contention; still, each such instance amounts to a denial of due process of law, and ought to be sufficient grounds for reversal and a basis for this Court to grant certiorari to consider this issue.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

August 12, 1977.

Respectfully submitted,



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In the United States Court of Claims

No. 178–75

(Decided April 20, 1977)

DISCOUNT CO., INC. v. THE UNITED STATES

Ralf H. Erlandson, attorney of record, for plaintiff. *Robert M. Hollis*, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, KASHIWA and KUNZIG, *Judges*

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This contract case is before us under the Wunderlich Act, 41 U.S.C. §§ 321–22 (1970), for scrutiny of a decision by the Department of Agriculture Board of Contract Appeals (Board). Plaintiff, Discount Company, Inc., appealed its termination for default to the Board, requesting that the termination be considered for the convenience of the Government.[1] The Board decided that the default termina-

[1] A termination for convenience is generally more favorable to a contractor than one for default. Under a termination for convenience, a contractor may receive his costs and any profit to date. If terminated for default, the contractor loses compensation for unpaid work-in-progress, and may be liable for delay or liquidated damages and excess costs of reprocurement. *See, e.g., G.L. Christian and Assoc. v. United States*, 160 Ct. Cl. 1, 312 F.2d 418, *cert. denied*, 375 U.S. 954 (1963); R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW, pp. 651–90, 755–778, 2d ed. (1969).

tion was appropriate and Discount subsequently requested a rehearing, which was denied with an opinion. Plaintiff then brought suit here to review the Board's decision, and Trial Judge Browne has recommended that the administrative determination in favor of the Government be reversed. We conclude, however, that the Board's upholding of the default termination should stand.

In May, 1968, the Forest Service awarded plaintiff a contract to construct the Mona Campground and Lookout Boating Site in the Willamette National Forest, Oregon. For a contract price of $104,399.99, Discount was to complete a boat launching ramp, parking lot and campgrounds within 180 days of the notice to proceed, which was issued on June 24, 1968.

From the beginning, plaintiff encountered difficulties on the job.[2] Discount was nonetheless on schedule at the time work was suspended (due to adverse weather conditions) in December, 1968. In October, 1968, the contracting officer had decided that plaintiff's work on the parking area and boat ramp was not in accordance with specifications and directed the contractor to remove the structures during the next construction season.[3] In addition, the contracting officer reminded plaintiff that during the next construction season the boat ramp area would be partially covered by the rising water level in the Lake Mona Reservoir. In fact, the water level limited Discount's access to the boat ramp and parking lot for most of the 1969 building season.

Prior to the resumption of work for the 1969 season, Discount and the Government's representatives had two

[2] One such problem, a continuing source of friction between the parties, was plaintiff's contention that a designated borrow pit site held so much unsuitable material that it represented a changed condition. See Plaintiff's Exhibit 5, Letter of July 31, 1968. The contracting officer denied plaintiff's changed condition claim and plaintiff appealed to the Board but the issue was not resolved during the 1969 construction season involved here.

[3] The Government claimed that the ramp and lot were nonconforming because the contractor used unsuitable materials and methods in their construction. During the period October, 1968 through July 18, 1969, the parties negotiated an "as is" acceptance of the structures. On July 18, 1969, Change Order No. 5 was issued and the "as is" acceptance confirmed. The record indicates that Discount was fully aware of the ongoing negotiations and was fairly certain of the outcome by the first week of July, 1969.

conferences to decide on the best way to proceed with the removal of the nonconforming structures and to plan the remaining work under the contract. The contractor agreed to wait until September 1969 (when the boat ramp would no longer be under water) to work on the allegedly nonconforming structures but to begin its campground construction on June 2, 1969.[4]

On June 2, the contracting officer submitted to Discount a change order which designated an alternative borrow site and also gave plaintiff a partial work resumption order for the campground construction agreed to at the second preseason conference. Plaintiff returned the order unsigned and alleged that it could not proceed because of problems with the Government's restaking of the area and certain clearing and grubbing difficulties. When the restaking was completed, the work order was reissued and signed on June 24, 1969, effective the next day. No work, however, was begun on the campground.

On July 14, 1969, the Forest Service ordered a full resumption of work, effective July 15. This full work resumption order took into account the Government's anticipated "as is" acceptance of the boat ramp (*see* footnote 3, *supra*) and required work to resume on all other phases of the project (particularly the campground). Despite this order (and the previous partial resumption order of June 24), which required work on the campground area (unaffected by the high water level), the Government alleges that no substantial amount of work was performed on the job site during the summer of 1969. Because of this alleged lack of progress, the Government, on July 23, 1969, sent Discount a 10-day cure notice demanding that work be resumed so as to ensure the project's completion before the expiration of the total contractual time remaining. It also requested a schedule for the work not yet begun or completed. When Discount neither resumed work nor provided a schedule, the contract was terminated for default on August 12th.

[4] While access to the Lookout Boat site was precluded by the rising water level, conditions at the campground permitted work to resume at any time during the 1969 season.

It should be inserted here that an additional point of contention between the parties arose during the summer of 1969. In June of that year, the Government submitted to plaintiff Pay Invoice No. 6, representing an estimated progress payment for work done in the previous year. Plaintiff disputed the estimated percentage of work completed and refused to sign; when the parties finally agreed, on August 4, 1969, to the amount due, the Government decided that Discount was in default of the 10-day cure notice, and was likely to be terminated; payment was therefore withheld to protect the sureties. This dispute over Pay Invoice No. 6 has resurfaced as an important point in the Trial Judge's decision and in the Government's objections to it.

Unlike the Trial Judge, we consider that the Board's factual findings were neither arbitrary, capricious, so erroneous as to imply bad faith, or unsupported by substantial evidence in the record as a whole—and that the Board's ultimate determination was permissible. The fundamental issue before the administrative tribunal, and now before the court, is whether Discount made so little progress on its contract in the summer of 1969 that a default termination was justified. The Government's notice of termination stated that at the time it defaulted Discount the extent of plaintiff's work was inadequate indication of the diligent performance required to assure completion of the project within the contractual time. The Board found that plaintiff failed to perform sufficient work during the summer of 1969 and that its failure was unexcused, and then concluded that based on Discount's entire performance the termination was warranted. We hold these determinations to be adequately supported under the Wunderlich Act.

First, the record demonstrates that the Board could allowably find that, despite two resumption-of-work orders and plaintiff's assurances that work would soon resume, no substantial progress was actually made on campground construction during the 1969 work season. As of August 4, 1969—weeks after the order to resume work had issued and a day after the 10-day cure notice had expired—

plaintiff had neither begun more-than-piddling construction activities at the campground, nor assured the Government that it could meet the completion deadline. Nor was any substantial work thereafter undertaken. The significant job left to do was the preparation and completion of the campground, and there was sufficient affirmative proof that Discount did practically nothing toward that goal.[5] Plaintiff impliedly admits as much when it repeatedly says in its brief that it could not grade the campground without borrow, but that it had no proper place from which to obtain borrow (a cardinal point we discuss later). Discount did do some minor work on other aspects (e.g. on a waterline and some plumbing) but there is very little doubt that it performed little or nothing on the central component—the clearing and grading of the campground.[6]

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[5] For instance a contemporaneous memorandum (by the contracting officer's administrative representative) of a meeting of July 31st stated: "In regard to clearing and grading, Mr. Norelius [plaintiff's chief officer] said, 'He will take the necessary steps for preparations, starting on Monday, to resume work.' * * * I emphasized to Mr. Norelius that all phases of work with the exception of the boat ramp were available and suitable for a resumption of work and the Government's position was that there was no reason why work could not be resumed in full. Mr. Norelius stated that he is preparing for a full resumption of work on all phases within the next two weeks and that his continuation of work on this contract will depend on talks he is to have with his bonding company on August 1."

Another contemporaneous memorandum by the same Government official describes a second conference at the site on August 4th, a day after the expiration of the 10-day cure notice:

> "We then discussed the planned resumption of work in relation to remaining contract time. Mr. Norelius was completely noncommittal as to any definite plans other than the testing of that section of the waterline already installed. I attempted over a period of approximately one hour to get a firm commitment from Mr. Norelius as to planned equipment and manpower and his schedule of completion of the project. He stated continually that he would commence to make the necessary preparations to resume work. It was apparent that he had no firm commitments at this time. I advised Mr. Norelius again that the 10 day cure period had expired and that we would have to make a decision regarding default of this contract. To be fair to him I would delay this decision one additional day provided he furnish us with a detailed schedule as to the proposed completion of the contract within the remaining time (approximately 46 calendar days remain). * * *"

[6] Discount complains about the stop order of July 2d prohibiting it from going ahead with the correction of the alleged deficiencies in the boat ramp, but, as we have indicated (footnote 3, *supra*), that order was issued because the Government was about to accept the boat ramp "as is"—and plaintiff knew that this was so. Furthermore, this stop order had very little to do with the work on the campground which was still open to plaintiff. These were different aspects of the contract work.

The next question is: did the contractor have adequate justification for this failure to make progress on the campground work? Before the Board and the court, plaintiff has contended that progress was impeded because of the unsuitability (allegedly amounting to a changed condition) of the material at the originally designated borrow site. The borrow site problem was disputed throughout 1968 (*see* footnote 2, *supra*), and in June 1969 a change order was issued designating an alternative site for the contractor's use. It is worth noting, however, that the material at the initial site was not so unsuitable as to make performance impossible and the contractor therefore had a duty to continue performance during the processing of his claim. *See, e.g., Penker Constr. Co. v. United States*, 96 Ct. Cl. 1, 37 (1942). In fact, that part of plaintiff's work which required material from the first site (*i.e.*, the boat ramp) was accepted "as is" by the Government. *See* footnote 3, *supra*. The first borrow site seems to have been no longer wholly available in the summer of 1969 (because partially covered by water), but the remaining borrow material needed for the 1969 campground construction could readily have been taken from the alternate site designated early that June. The plaintiff's only answer is that it rejected this proposed change order and was never officially ordered to use the alternate site. Discount's objection was not that the new borrow was unusable—on the contrary, it is quite clear that it was adequate—but that the change order should include an upward equitable adjustment because of higher transportation costs.[8] This is precisely the kind of controversy to be handled under the "disputes" mechanism by appeal to the Board if necessary. Meanwhile plaintiff was required by its contract to continue performance under the change order. *See Penker Constr. Co. v. United States, supra*. But, Discount now says, the change order was merely a proposal, the defendant never took the further step of unilaterally ordering it to use the alternate location despite its objections, and without such a further unilateral

[8] The change order, as transmitted by the Government, provided for no increase in the contract price.

order the contractor would have waived its right to the equitable adjustment it desired. This hypertechnical contention—wholly divorced from the realities of the situation—can hardly be accepted as a proper excuse for refusing to make use of the alternate borrow site. In the circumstances here, it is immaterial whether the designation of the new borrow place was merely a government proposal or a fully operative and effective change order. Plaintiff knew that the designation of the alternate borrow site came to it in June 1969 on a form labeled "Contract Change Order Or Data Sheet Covering Amendments" as "Change Order Number 3"; it also knew that the new site was available, that the Government was willing to have it used and wanted it used if it became the only suitable borrow open to the contractor. Moreover, plaintiff was aware, or should have known, that it could have protected its right to an equitable adjustment by simply saying so—that it would comply with Change Order Number 3 but would still pursue its alleged right to an increase in the contract price. Plaintiff never asked for the additional unilateral order it now calls an absolute prerequisite, nor did it tell the defendant, when it was being repeatedly pressed in the summer of 1969 to proceed with the work, that the main obstacle was that it could not safely use the alternate borrow site without such an additional order. We must infer that this excuse, the major one proffered us, is an afterthought, not a real justification for failing to proceed with the campground work in the 1969 summer.

Discount also has insisted that construction during the 1969 season was impeded due to an alleged failure by the Government to properly restake the area. There is, however, enough evidence (though not undisputed) showing that the Government agreed (at the pre-work conferences) to restake the area and that this work was sufficiently completed in mid-June. The Mona Campground construction, scheduled for the 1969 season, could have gone forward by the end of that month. Accordingly, the Board's finding that the staking difficulties did not preclude Discount's resumption of work throughout the entire season is supported by substantial evidence.

There are other assertions made on plaintiff's behalf to demonstrate that the default termination was improper. One is that the termination, which was in effect one for anticipated failure to complete, was wrongful because the contractual time had not yet run. The Trial Judge distinguished the instant case from those in which the contractor was already at the end of the contract's time period when the termination notice issued. Of course, the distinction is factually correct but the default clause in this contract did not require a finding that completion within the contract's time limitations was impossible. Rather, under this contract default termination was appropriate if a demonstrated lack of diligence indicated that the Government could not be assured of timely completion. It is therefore proper, once this lack of diligence has been found, to rely upon cases involving abandoned or repudiated contracts, as well as other decisions similar to the one at bar which have upheld "failure to make progress" terminations. *See, e.g., Universal Fiberglass Corp. v. United States*, 210 Ct. Cl.____, 537 F.2d 393 (1976); *American Dredging Co.*, ENGBCA 2920, 72-1 BCA ¶9316, *aff'd*, 207 Ct. Cl. 1010 (1975).[9]

The Trial Judge also found that, because the contractual time had not yet expired, Discount was in fact wrongfully terminated on a technicality—its failure to provide a work schedule at the last hour (requested by the contracting officer but not explicitly required under the contract) outlining proposed plans for further work progress. The record is plain, however, that the default termination was not based on this demand *per se* but rather on the over-all evidence of Discount's failure to prosecute diligently its work under the contract. The function of the work schedule was to show that the contractor was ready, willing and able

[9] Because their facts were so different from those we must accept here, neither *Dale Constr. Co. v. United States*, 168 Ct. Cl. 692 (1964), nor *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968), is pertinent. In the first, the only permissible finding was that a ready, willing, and able contractor was terminated, not for lack of diligence, but because it had submitted a claim for extras. In the latter, the Navy failed to use its own discretion whether or not to terminate but simply buckled under pressure from Congress.

to make progress; Discount's failure to furnish such a schedule merely served to bolster the Government's position that it was justifiably insecure about the contract's timely completion.

Another contention on plaintiff's behalf is the effect of the much-disputed Pay Invoice No. 6. Discount did not directly contend, either in its brief or on oral argument before us, that the Government's failure to pay the full amount requested by plaintiff precluded it from proceeding during the 1969 construction season. Further, the Board determined that there was no evidence before it sufficient to prove that the failure to proceed under the contract was connected with Discount's non-receipt of government payments. The Trial Judge, however, emphasized Discount's financial difficulties and found that the Government's refusal to pay under Invoice No. 6 so severely hampered plaintiff's performance that its lack of progress was excusable. We do not think that this conclusion can stand against the Board's contrary finding. If the plaintiff had been in dire financial straits it could have accepted the amount offered under the invoice and disputed the remainder. In addition, this court has held that financial difficulties create excusable delays only if precipitated by Government actions.[10] The non-payment here was not as a result of the Government's wrongful withholding of money clearly due but rather resulted from a good faith controversy, which was handled through appropriate channels, over the amount owed. It is true that the amount was finally settled on August 4, 1969, but defendant still refused to pay because the 10-day cure period had expired and the Forest Service personnel felt that the contract was likely to be terminated for default. We do not decide whether or not the Government was right in retaining the check at that late point for the benefit of the surety[11] because it seems clear that the failure to pay after August 4th did not

[10] *See, e.g., Litchfield Mfg. Corp. v. United States*, 167 Ct. Cl. 604, 338 F.2d 94 (1964).

[11] The surety had not requested that the payment be withheld but there had apparently been some claims by suppliers (and others) of unpaid bills.

trigger plaintiff's default which, as the Board found, had already existed and continued for some time.[12]

There is one final point to be mentioned. The Trial Judge has raised the issue of Government prejudice against plaintiff and has suggested that this prejudice tainted the default termination. Although it is obvious that theirs was not a friction-free relationship, the contractor did not argue prejudice before the Board or the Trial Division of this court. The Trial Judge does not point to any evidence in the record (except perhaps Discount's own accusations of prejudice in very late self-serving letters to the contracting officer) sufficient to meet the high burden of demonstrating the Government's bad faith.[13] On the contrary, this assertion of prejudice seems to us unfounded in the record. The Government officials appear to have acted in the full and honest belief that plaintiff had no proper excuse for failing to go forward with the work, and at the very least they had much support in plaintiff's attitude and actions. As for the Board, though it decided this case against Discount (as we have held, allowably so), it determined another appeal, very shortly before, in its favor.[14]

In sum, we accept the Board's findings and conclusion, as our review of the case reveals that the Board's determination was supported by substantial evidence on the record and is in harmony with relevant contract law. The Board's decision is therefore affirmed. Defendant's motion for summary judgment is granted, plaintiff's motion is denied, and the petition is dismissed.

KUNZIG, *Judge*, dissenting:

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[12] After August 4, plaintiff does not appear to have inquired about payment of Invoice No. 6 until the afternoon of August 11. The termination was the very next day, August 12.

[13] *See, e.g., Knotts v. United States*, 128 Ct. Cl. 489, 492, 121 F.Supp. 630, 631 (1954), that the presumption of official good faith can be overcome only by "well nigh irrefragible proof."

[14] The plaintiff itself rejected (before the Board) the position that it was financially hampered on the instant contract by its problems on the other one.

I respectfully dissent from the majority opinion. I would adopt the opinion of Trial Judge Browne, which follows hereafter:

BROWNE, *Trial Judge*: This case comes before the court for judicial review, under the provisions of the Wunderlich Act,[1] of a decision of the Board of Contract Appeals for the United States Department of Agriculture (Board) dated June 25, 1974[2] and the denial of appellant's motion for reconsideration by the Board on September 26, 1974.[3]

Plaintiff, Discount Co., Inc., of Springfield, Oregon, was awarded Contract No. 002112 on May 20, 1968, by the Forest Service of the United States Department of Agriculture. The contract called for construction of a facility identified as "Mona Campground and Lookout Boating Site" in the Willamette National Forest, Lane County, Oregon. The amount of the contract was $104,399.99. Work was to be completed within 180 calendar days after receipt of notice to proceed. The contract was terminated by the Government by "Notice of Termination" dated August 12, 1969. The termination was based on anticipated default of the contractor, the time for completion not having expired as of the date of termination.

Plaintiff seeks, in this case, to have the default termination be denominated as a termination for the convenience of the Government and that a determination be made as to the amount of equitable adjustment to which plaintiff would be entitled or, in the alternative, to recover in *quantum meruit* for plaintiff's services and to recover plaintiff's damages proximately caused by the Government's termination of the contract.

Plaintiff asserts that the decisions of the Board were:

1. Arbitrary and capricious;
2. So grossly erroneous as to imply bad faith;
3. Not supported by substantial evidence.

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[1] 68 Stat. 81, 41 U.S.C. §§ 321 and 322 (1970).

[2] AGBCA No. 273, 74-2 BCA ¶ 10,775.

[3] AGBCA No. 273, 74-2 BCA ¶ 10,855.

Plaintiff further asserts that the decisions of the Board were erroneous as a matter of law.

Defendant supports the Board's decision both as to the facts and the law.

I would find that termination was for the convenience of the Government and remand the case for determination of the amount to which plaintiff is entitled as equitable adjustment and damages.[4]

I. *Summary of Facts*

The Forest Service of the United States Department of Agriculture awarded Contract No. 002112 on May 20, 1968 to Discount Co., Inc., P. O. Box 17272, Portland, Oregon 97217 for "Construction of Mona Campground and Lookout Boating Site" in Willamette National Forest, Lane County, Oregon. The contract called for completion of the work within 180 calendar days after receipt of notice to proceed. Work was to commence within 10 calendar days after date of receipt of notice to proceed.

The contract called for, among other things, construction of a number of campground camp units, a boat-launching ramp and a parking area. The contract specified the location of a "Case I borrow source" from which the contractor could obtain fill to be used as a base for the boating ramp and the parking area. The composition of the material of the Case I borrow source was the principal object of controversy throughout the period of the contract. The controversy over this matter was the proximate cause of the delay in performance by the contractor.

Shortly after the contractor commenced work, he found that the Case I borrow source contained a large amount of unsuitable material. The contracting officer ordered the unsuitable material to be removed and issued a work order to authorize the extra work. However, no provision was made in the work order dated June 28, 1968 for extra payment for removing the unsuitable material from the borrow source. By letter dated July 31, 1968, the contractor

[4] 28 U.S.C. § 1491 (Supp. IV, 1974).

requested an increase of 87 cents per cubic yard to cover the increased cost of complying with the work order issued by the contracting officer.

In the same letter, the contractor requested, as an alternative, that another borrow source, containing the necessary amount of approved acceptable material, be provided and that equitable adjustment in payment and contract time be made.

Concurrently with the controversy over the suitability of the Case I borrow source material, a disagreement arose over a work order issued by the contracting officer dated June 28, 1968 requiring 32 fires to burn trees, down timber, stumps, brush, wood chunks and sticks removed from the Case I borrow. By letter dated October 3, 1968, the contractor requested payment for the additional work required to comply with this work order. By letter dated September 16, 1968, the Contracting Officer's Authorized Representative (COAR) advised the contractor that his claims for additional compensation for this work would not be approved.

When the contractor complained about the decision of the COAR, an investigation was made by the Contracting Officer's Representative (COR), Mr. Hickey, and Inspector Campbell. A report on the results of that inspection dated November 1, 1968 indicated that even though most of the unsuitable material from the borrow pit was piled in one corner of the borrow pit there were 20 small piles of debris around the parking lot and boat ramp.[5]

It appeared to the inspecting team that the debris in the 20 piles resulted from a clearing of the boat ramp and parking lot areas and included a small amount of debris not required to be removed under the work order of which the contractor was complaining. The report also indicated that the inspecting team did not see any burning of any of the debris from the borrow material. In fact, their check of the record of the ranger district showed that the last burning permit issued to the contractor was for the period

[5] These were 20 of the 32 sources of fires required by the work order.

of July 16 to July 19 whereas the excavation of the borrow material did not start until July 24, 1968.

Work was suspended during the winter months of 1968–1969, during which time the progress made by the contractor was reviewed. A letter dated January 2, 1969 was sent to the contractor advising him of the results of the review to that date. Among other things, it was stated that:

> * * * there are one or two points that we feel should be brought to your attention as they will undoubtedly reflect on the scheduling of your work following the resumption of operations.

The report also stated that as of the suspension of work on December 18, 1968, 102 days of the 180-day contract period had been used (constituting 57 percent of the time allowed) and that 27 percent of the contract work had been completed. However, the report stated:

> According to your proposed progress schedule submitted on August 20, 1968, you are presently on schedule from an overall standpoint although some individual items are either behind or ahead of the schedule.

The report also indicated that, due to the schedule of the Corps of Engineers in filling the reservoir to which the boat ramp would lead, the lower end of the boat ramp would be under water around May 1, 1969. The report stated:

> This situation may present a problem in completing the contract on schedule and we ask that you give it your fullest attention.

The only item specifically mentioned as requiring early attention was a pile of debris, then located within the limits of the reservoir, since the water level would rise to that point "sometime late in March or early April."

No provision was made at that time for resumption of work before the level of water in the reservoir would reach the lower end of the boat ramp.

Finally, the report made the following request:

> * * * In order that we may program our workload and inspector needs, it would be appreciated if you would contact COR Hickey at your earliest opportunity and advise him of your detailed schedule for completion of

> the boat ramp and parking lot and also the completion of the clearing operations in the campground.

Thus it appeared that there was a truce in the "running battle" between the COR, COAR, and the contractor, which placed the contractor and the Government representatives on a new and amicable footing when the work would resume in the spring.

A "prework resumption meeting" was held at the site on May 14, 1969 "to review past work and discuss future plans with the contractor and his superintendent." Eight Government representatives attended the meetings along with the contractor and the contractor's superintendent.

Whereas it was anticipated that the water level of the reservoir at the boat ramp would reach a high elevation of 1,350 feet by about May 1, the water level reached an elevation of approximately 1,348 feet[5a] as of May 14, 1969 (thereby covering a major portion of the boat ramp).

The Government, upon completion of this inspection, contended that the placement of the borrow material in the boat ramp and parking lot was not in accordance with the specifications since it contained more than the allowable amount of unsuitable borrow and that the two areas, therefore, would not be acceptable in their state at that time. The minutes of the meeting as recorded by the COAR, with reference to the high water level, included the following statement:

> * * * Under these conditions the Government recognizes the impracticality of resuming work on this portion of the contract on a piecemeal basis. Therefore it will be the contractor's option to resume work on that area available to him or delay all work on the Lookout Boat Site until the water level recedes, which is anticipated to be in the later part of September.[6]

The minutes further indicate:

[5a] The elevation was apparently stated erroneously as 1,648 feet in plaintiff's exhibit 8 and in the transcript at page 60.

[6] The Government contends that all other work, except the "work on the Lookout Boat Site" was to proceed on full schedule in the meantime. The contractor understood that no work was required until all work could be done on a continuous basis.

> Mr. Angell [the contractor's superintendent] indicated that it was not planned to resume work on the boat ramp and parking lot until such a time that the water level was down and removal and replacement of fills could be a complete and continuous operation.

The position of the Government with regard to the suitability of the Case I borrow source remained unchanged as of the time of the meeting. The minutes indicate, however, that a second source previously not available to the Forest Service for its use, would be designated as an Alternate Case I source and could be used by the contractor. The minutes further state:

> * * * The alternate source was pointed out and examined. The limits of the source will be staked on the ground and a change order issued prior to resumption of work. The contractor may use either or both sources.[7]

The campground area was inspected and the minutes indicate that the ground conditions in that area were favorable and would permit work to resume at any time. However, clearing and construction stakes which were previously placed "to a great extent, were missing or destroyed." It was agreed that the Forest Service would replace the staking at no expense to the contractor, prior to the resumption of work. The restaking was to commence on May 20 with arrangements being made for the contractor's superintendent to meet with the COR at the site the following day, to view the staking operations and become familiar with the coding and placement of the stakes.

Upon completion of the staking, a controversy arose over lack of completion of the restaking by the Forest Service, making the resumption of work on May 26, 1969 impossible. (The minutes indicate that 78 days of the 180 days still remained for the work to be completed under the contract as of that time.)

Although one pile of slash and debris (located northeast of camp unit No. 21) was partly covered by water from the reservoir and could not be burned until the water level

[7] In the context of the minutes of the meeting, the alternate source would not be used until September, when work on the boat ramp would be resumed.

receded (in September), the remainder of the clearing and grubbing could have continued without delay. In conclusion, it was mutually agreed that work would resume on May 26, 1969 on the campground, following completion of the restaking. The agreement to resume work, however, is somewhat inconsistent with the fact that it was impractical for the contractor to resume work on the boating site portion of the contract on a piecemeal basis, it being the contractor's option

> * * * to resume work on that area available to him or delay all work on the Lookout Boat Site until the water level recedes, which is anticipated to be in the later part of September.

A further meeting was scheduled for May 23, 1969 in the Forest Service office in Eugene, Oregon.

The further meeting took place as scheduled. The COR, the COAR, and the previous COR, as well as the contractor's superintendent, were present. At that meeting it was understood that the construction staking could not be completed until May 29, 1969 but that the clearing limit staking was nearly completed and would be completed by May 26, as scheduled.

It was mutually agreed that the resumption of work *on the campground* should be delayed until June 2, 1969. This was to permit the Forest Service crews to complete the restaking prior to resumption of work.

It was also agreed that the Alternate Case I borrow source would be staked and a change order issued prior to resumption of work. (Change Order No. 3, dated June 2, 1969.)[8]

The contractor's superintendent indicated that it was the contractor's intention to

> * * * proceed immediately with all work available to him and accomplish that work in the shortest time possible and practical.

He also indicated that they might not start with all the equipment and men on June 2, 1969, but that, if not, they would be in full production shortly thereafter.

[8] No copy of this document found in record.

In the meantime, the dispute regarding the contractor's claim for clearing and grubbing of the Case I borrow source material was taken to the Board of Contract Appeals. While the minutes of the meeting do not specifically mention anything about the contractor's claim with respect to the borrow source material it appears that the intention was to use the alternate borrow source and yet, there was no comment on additional payment to be made to the contractor if the alternate borrow source was used.

The contractor's good faith and bona fide intent to resume and complete the work was illustrated by a statement in the minutes of the May 23, 1969 meeting to the effect that:

> Mr. Angell indicated that Discount Company intended to notify the local newspapers of their plans for resumption of work and request the public to stay out of the construction areas. They also intend to place warning signs and barricade the project area.

This entry is made under the heading "public relations." In further elaboration, the minutes state:

> In view of the public relations aspect of the project, Mr. Angell was requested to coordinate as much as possible with the Forest Service regarding signing and press releases. A joint effort by both parties can accomplish the purpose and maintain good public relations.

Notwithstanding the intentions of the parties to proceed with the work as soon as possible, it was not until June 25, 1969 that a "partial resumption" work order was issued. The document bears a typewritten date of June 2, 1969, but that date was obliterated and a handwritten date of June 25, 1969 was inserted. The order made reference to the prework conference of May 23, 1969 and carries a handwritten note "see Discount letter of 6/24/69" and what appear to be the initials of the COAR.

According to the testimony of the contractor (which appears to be uncontradicted) he proceeded to move equipment into the site on July 2, 1969 pursuant to the order to fully resume work as of June 25, 1969. The

contractor testified with respect to his efforts to resume work on July 2, 1969:

> As soon as the equipment was on the site and it was started up, it started up at the boat ramp in preparation to move out the parking area, the COR on the project immediately gave us a work order directing us "no work is to be done on removal and replacement of rejected fills as presently in place in Lookout Point boat ramp and parking lot. This order is issued pending result of negotiations on a proposal being presented to your legal representative by the contracting officer. This proposal involves a conditional acceptance of the fills as placed."
>
> This was signed on the project site by the project superintendent at 3 p.m. in the afternoon, 7/2/69. It was taken immediately down to the equipment supplier and the man who was working bringing the equipment. He was told that he couldn't start up in that area. He signed this also.
>
> They told T & T Logging to stop at 3:15 p.m. They loaded up the loader and moved it out. It's signed by William R. Taylor.
>
> It stopped the operation right there.

Concurrently with the contemplated resumption of work, a controversy was running with respect to the amount of payment due the contractor for work already completed. In particular, the controversy revolved around the percentage of completion of specific items up to the time of resumption of work in the spring or summer of 1969.

A meeting was held with the contractor in Portland, Oregon, on July 14, 1969, at which time the contractor was advised that a total work resumption notice would be issued effective July 15, 1969. (A certified mail receipt indicates that the notice of total work resumption was received by the contractor on July 17, 1969.)

The work order, effective July 15, 1969, called for:

> Full resumption of work on all phases of the project *excepting* that portion of work, as it pertains to the Lookout Boating Site parking lot and boat ramp, presently being arbitrated * * *

The document indicates that it was issued on July 14, 1969, and was mailed by certified mail to the contractor at P. O. Box 3, Springfield, Oregon 97477 on July 14, 1969. A copy

of the notice was also sent to the contractor's attorneys, Robertson and Wills, 18448 Southeast Pine Street, Portland, Oregon 97233.

The record does not indicate what transpired during the week following July 15, 1969. However, by letter dated July 23, 1969 the contracting officer placed the contractor on notice that, unless work would be resumed by August 3, 1969 (10 calendar days after *receipt* of the letter, July 17, 1969) "with such diligence as to insure completion of the work within the remaining contract time" (57 calendar days then remaining according to the contracting officer's computations), the Government would have to consider termination of the contractor's right to proceed with the work and subsequently to terminate the contract for default.

The contracting officer's letter of July 23, 1969 which threatened to terminate the contractor's right to proceed and also threatened subsequent termination, failed to make reference to the effort of the contractor to resume work on July 2, 1969. Likewise, no reference was made to the stop order which precluded the contractor from proceeding to take out and replace the boat ramp and the parking area borrow while the Government was reconsidering its prior refusal to accept those portions of the work. Meanwhile, time was running against the contractor since the partial resumption order was effective June 25, 1969.

Prior to this time, apparently without knowledge of the contractor, the Government had already decided to accept the boat ramp and parking area "as is" and make a contract adjustment accordingly. It was not until later that the contractor was advised that the Government had decided to accept the boat ramp and parking area "as is," thereby relieving the contractor of any further responsibility for that portion of the contract.

Having received the letter of July 23, 1969 from the contracting officer, the contractor met with the COAR on July 29, 1969 to discuss the status of the contract. The contractor indicated that his superintendent had not been furnished adequate information to permit him to resume

work and that the matter of payment for work completed had not been resolved.

The contractor also discussed the matter of using the Alternate Case I source for completing the work on the boat ramp and parking area. He was concerned lest he would not be compensated adequately for hauling the fill from the Alternate Case I source since nothing was mentioned in the change order concerning such compensation. He was advised by the COAR that the change order would be revised to provide for compensation. He asked that he be compensated at a rate of 30 cents per cubic yard. The COAR told him that he could see no problems involved in that revision since if this was the only thing standing in the way of resolution of the problem, the Government would be agreeable.

Even this discussion apparently did not take into account the fact that the Government had already decided to accept the boat ramp and parking area "as is." Otherwise there would have been no reason to discuss the alternate borrow source.

The contractor thereafter telephoned the COAR on July 31, 1969, requesting a meeting at 4 o'clock that afternoon to discuss the pending claim for payment for work completed. Upon inquiry by the COAR as to the status of the contractor's resumption of work on the project, he was advised by the contractor that work would resume at 8 a.m., Monday, August 4, 1969. It was indicated that the contractor intended to resume work on the waterline construction and the grading of the campground roads. He did not intend at that time, to resume any work on the boat ramp or parking lot, it being understood that such work would not be resumed until the water level was expected to recede in September (the contractor still being unaware of the Government's decision to accept the boat ramp "as is"). The contractor also indicated that work on the waterline could not be resumed before August 4 because his plumbing subcontractor was tied up on another job. Furthermore, the contractor said he could not resume work on the grading until he reviewed the change order, on the site, before any stakes were disturbed.

The meeting was held the afternoon of July 31, 1969, as scheduled. Both the COR and the COAR were present. An agreement was reached as to their differences regarding the percentage of work already completed in connection with the contractor's claim for payment for such work. The contractor was advised that the revised pay estimate would be submitted to him the following Monday morning.

Thereafter, the discussion related to resumption of work. The contractor repeated his earlier representation that waterline construction would start on Monday, August 4, at 8 a.m., and, with regard to clearing and grading, he would take the necessary steps for preparations, starting on Monday, to resume work.

It was further agreed that construction on the water tank would start after the waterline had been tested, the ditch backfilled and access to the site provided. The COAR took the position that all phases of work, *with the exception of the boat ramp*, were available and suitable for resumption of work and that "the Government's position was that there was no reason why work could not be resumed in full."

The contractor took the position that he would be prepared for a full resumption of work on all phases *within the next 2 weeks, i.e.*, by August 14, 1969. He further conditioned his representation on the outcome of talks he was to have with his bonding company on August 1, 1969.

The contractor was informed that the COAR and the COR would be present on the site at 8 a.m., Monday, August 4, to determine whether or not a conscientious effort was being made to resume work on the contract. Other minor matters were discussed during the conference, such as the location at which the contractor would dispose of large rocks and other material dug up during correction of the fill slopes. These matters, however, were of no consequence overall.

The COR (Davis) arrived at the site at 8:05 a.m., on August 4, 1969, as scheduled. The contractor's superintendent, Angell, and two employees were there also. Shortly thereafter, the contractor (Norelius) arrived, as did the plumbing subcontractor, Hope, and one employee. All

except the COR and Norelius proceeded to repair a break in the 6-inch waterline and to install a T connection which had been omitted in the earlier construction.

The plumbing subcontractor had scheduled ditching of the remainder of the waterline. However, upon reviewing the site on August 3, 1969 (the previous day), he found that the staking was not complete. Thereupon he cancelled the order for the equipment to complete the trenching pending replacement of the missing stakes. The COR and the contractor's superintendent later found adequate stakes in place in the area.

The COAR advised the contractor that approximately 46 calendar days remained for completion of the contract and requested a schedule of completion of the contract. The contractor was reminded of the fact that the 10-day "cure period" prescribed in the letter dated July 25, 1969, had expired but he would be allowed an additional day (to the close of business on Tuesday, August 5, 1969) to furnish a detailed, day-by-day schedule of proposed completion of the contract within the remaining 46 calendar days. The contractor asked that he be allowed until Wednesday, August 6, 1969, to submit the schedule since he would be busy lining up equipment on Tuesday, August 5, 1969. This request was refused by the COAR. *In conclusion, he was informed by the COAR that if he hesitated to resume work and thereby jeopardized completion, the contract would be terminated.*

The record indicates that the contractor was preoccupied with the matter of collection of the money due him for the work already completed. It further appears that the bonding company and the contractor's creditors were likely to be the beneficiaries of any money received, thus virtually eliminating any incentive for the contractor to put out the additional funds to complete the contract.

It is equally evident from the record that the Government was less than fair in its treatment of the contractor in that it held up payment of the amounts due for completed work as a means of forcing the contractor to submit a detailed, written schedule of completion. *There is no indication, however, that the contract would not have*

been completed within the number of days remaining for completion.

The contractor, by letter dated August 5, 1969, wrote the COAR as follows:

> On the Project this Monday I explained the Methods and procedures that would be used for completing this project with the existing changes and changed conditions. You stated the government was aware of all conditions and felt that an accellerated [sic] schedule should be implemented. This schedule is under preparation and will be submitted very shortly.
>
> The change orders I received Monday are being processed and appear favorable.
>
> We will continue to proceed diligently with performance of this contract.
>
> If there are any questions, please do not hesitate to contact me.

The letter did not convince the COAR that the contractor's expressed intention to "continue to proceed diligently with performance of this contract" was supported by any overt showing of likelihood of accomplishment. Notwithstanding the contractor's promise to submit "very shortly" an accelerated schedule of completion (already under preparation), the COAR, by letter dated August 7, 1969, warned the contractor that "[v]isible action or lack of action on your part will determine the necessary course of action to be taken by the Contracting Officer."

The record[9] indicates that the contractor telephoned the COAR on the afternoon of August 11, 1969, regarding the payment being withheld by the Government. The COAR could not give an immediate answer as to the status of payment but agreed to call back within an hour (by 3 p.m.). The contractor indicated he would call back in 2 hours (by 4 p.m.). Instead, the contractor's superintendent called the COAR in behalf of the contractor at about 4:30 p.m.

The COAR informed the contractor's superintendent that *payment was being withheld pending the decision by the contracting officer (CO) on termination of the contract,*

[9] Memorandum to Files, prepared by COAR on August 14, 1969 (3 days after the occurrence of the events recited therein and 2 days after the "Notice of Termination" was sent to the contractor).

which decision was expected to be made by noon the next day, August 12, 1969.

At about 8 p.m. the evening of August 11, 1969, the contractor phoned the COAR at his home to obtain verification of the message given him by his superintendent. The COAR verified it and confirmed that he, alone, had made the decision (in the absence of the CO, and with full knowledge of the acting CO) to *withhold payment for completed work pending the decision of the CO on termination.*

The next day (August 12, 1969) the contractor replied to the letter from the COAR, sending a copy to the CO. The letter reads as follows:

> These facts occured [sic] with the pay estimate while you were on vacation and are presented to you for corrective action, as stated in our meeting this morning.
>
> As you know, pay estimates have been delayed for various invalid reasons on our projects. We have been trying to complete the evaluation agreed to be made at the project site meeting of May 14, 1969. The Forest Service took exception to the results of previous evaluations and on July 31, I met with Mr. Roth and Mr. Davis and using the Forest Service calculations the present evaluation was arrived at.
>
> I asked for prompt processing of the pay estimate and Mr. Roth said it would be ready Monday August 4th for signing and processing, and it was signed by Mr. Angell and Mr. Davis for processing and payment.
>
> On August 11th, I phoned Mr. Roth and asked him if this estimate had been processed. He stated he would check on it, later this same day Mr. Angell phoned Mr. Roth and was told this pay estimate was being held up by Mr. Roth pending possible termination of the contract by Mr. Donkel.
>
> When Mr. Angell informed me Mr. Roth had been holding up this pay estimate, and realizing the deception involved, I phoned Mr. Roth and he then informed me he had retained this pay estimate because we had not notified him of action taken regarding unpaid obligations and claims against the bonds and he was awaiting the decision on terminating the contract. He was therefore not processing this estimate agreed upon July 31, 1969.
>
> This deception with the pay estimate by Mr. Roth required me to reschedule the planned equipment being

moved to the project for a more compatible date. The uncertainty of the Forest Service activities made this necessary.

The participation of Forest Service Officials to deliberately apply economic pressure in this deceitful manner of holding up pay estimates, which the Forest Service apparently did not intend to honor, certainly is unethical and deceitful and requires corrective action.

On August 4th at the project Mr. Roth demanded an accelerated performance schedule by the next day. I told him the time allowed was unrealistic to prepare a detailed schedule but would have one within two weeks. The answer to his letter of August 7, 1969 is being prepared also.

On August 14, 1969, the contractor wrote a separate letter to the CO, sending a copy to the COAR. The full text of this letter is as follows:

In reply to your letter of August 7, 1969, the facts should have been stated by you more accurately.

You observed that we were proceeding diligently in the only area available for us to proceed in an orderly sequence, because the Forest Service had not provided the essential cooperation and follow up of their agreements promised us, so construction could prevail in an orderly manner in a continuous effective operation.

Men and equipment would have been performing on the parking area water installation system had the Forest Service completed the staking they assured us they would do. However, water line work was being performed in the only areas available, to the tank site.

The builder will complete his work when the tank site is available for work after this section of water line is completed.

Boat Ramp and Parking Area work was curtailed because high water made it hazardous, and impractial [sic] to perform work there.

In the campground on Monday August 4, 1969 was the first time the changes were inspected jointly, even though we had previous [sic] requested your cooperation to review these changes, to facilitate prompt resumption of contruction [sic]. Construction could not feasibly proceed until this joint inspection of campground changes.

The above was adequately explained to you on the project, and you acknowledged understanding the conditions created by the Forest Service, I was thereby

astonished when your letter did not indicate the correct discussion. It appears that your prejudice overcomes a proper judgement [sic] of this project.

As of August 14, 1969, the contractor apparently had not received the "Notice of Termination" issued by the CO on August 12, 1969. The text of that notice is as follows:

Reply to: 6320 Contracting August 12, 1969

Subject: Notice of Termination, Mona Campground and Lookout Boating Site, Bid No. R6-68-183, Contract No. 002112

To: Discount Company
P.O. Box 17272
Portland, Oregon 97217

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

By Certified Mail, dated July 23, 1969, and receipted for by E. E. Angell, Vice-President and Project Superintendent, at 8:30 a.m. on July 24, 1969, you were advised "we are placing you on notice that if work has not been resumed on this contract within ten calendar days after receipt of this letter with such diligence as to insure completion of the work within the remaining contract time, we will have to consider termination of your right to proceed with the work, and subsequently terminate the contract for default."

The ten-day period specified for returning to work expired August 3, 1969. During this period you did not perform any work on the project site. Subsequent to this period you have only performed minor work testing and repairing previously installed water lines. The extent of this work is inadequate evidence of the diligent performance required.

The letter of July 23, 1969 reiterated some of the events and circumstances related to your failure to return to work on this project during the current work season which are cause for the termination of this contract for default.

Subsequent to the expiration of the cure period allowed on August 4, 1969, you met with Wm. H. Roth, Contracting Officer's Administrative Representative on

the project site to discuss your possible return to work. The documentation of this meeting was sent to you by Mr. Roth's letter of August 7, 1969. A copy of this letter is attached. To date you have not furnished the Government with any proposed schedule of your plans for completion of this project to in any manner assure us of possible completion within the remaining contract time.

As of the close of business this date you have not resumed work in such a manner as to assure completion of this contract within the remaining contract time. Considering these facts, it is my determination to terminate this contract for default.

Your right to proceed further with the performance of the contract is terminated effective at close of business this date, August 12, 1969, or date of receipt of this notice, or notification thereof, whichever is later.

The Government may cause the contract to be completed and you, the contractor, will be held liable for any increased costs.

The Government reserves all rights and remedies provided by law and under the contract, in addition to charging increased costs.

This notice constitutes my decision, pursuant to the Disputes clause, that you are in default as specified and I have determined that your delay in prosecution of the work is not excusable.

This decision is made in accordance with the Disputes clause and shall be final and conclusive as provided therein, unless, within thirty days from the date of receipt of this decision, a written notice of appeal addressed to the Secretary of Agriculture is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor or by an attorney acting on your behalf, and which may be in letter form, should indicate that an appeal is intended, should refer to this decision and should identify the contract by number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.

ROBT. L. DONKEL
Contracting Officer

cc: Robertson & Wills
Attorneys at Law
18448 S. E. Pine
Portland, Oregon 97233

United Pacific Insurance Co.
415 S. W. 10th Avenue
Portland, Oregon 97201

Discount Co.
P. O. Box 3
Springfield, Oregon 97477

COR Charles Davis, Willamette NF
COAR William H. Roth, Willamette NF
Willamette NF (B&F)
Willamette NF (6320)

It is in the context of the foregoing climax to the contentious relationship between the contractor and the Government representatives that the ultimate issue must be decided. Due regard being given to the Board's findings of fact in this case, the court must ultimately decide whether or not the Board erred in refusing to hold, as plaintiff urges, that the termination for default should be treated as a termination for convenience of the Government.

The August 14, 1969 memorandum of the COAR's recollection of this telephone conference (see note 9), perhaps more than any other single document in the case, places in focus the ultimate issue in this case.

The question comes down to this:

May the Government withhold payment of amounts due for completed work, yet terminate the contract unilaterally for failure of the contractor to submit, by a specified date, a "detailed plan for accomplishment of the remaining work within the remaining contract time" in the absence of evidence which would clearly establish impossibility of completion on time?

II. *Summary of the Law*

No case has been cited by the parties which is more nearly in point than this court's decision in *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692 (1964). In that case the court, *per curiam*, adopted the opinion, findings and

recommendation of the "trial commissioner." The essential portions of that opinion are summarized hereinafter.

Dale contracted with the Army to replace a 16-inch cast iron water main at the Boston Army Base with a new main made up of a combination of 16-inch cast iron pipe and 16- and 12-inch cement-asbestos pipe. Start of the contract was delayed due to unavailability of the cast iron pipe. However, construction was ultimately started, using the available cement-asbestos pipe pending availability of the cast iron pipe. Further delay was caused by the failure of the Boston City Water Department to close a specified valve (the specified valve being imbedded in the street, and therefore not visible) before excavation was commenced. When excavation was commenced, the trench and adjacent areas were flooded. The contractor's claim for his loss due to the flooding and delay was denied by the CO.

Dale continued work on the cement-asbestos pipe section until freezing weather (at the end of December) necessitated cessation of the work. The work was resumed, however, the following March.

There followed other delays such as the refusal of the Army to prevent its employees from using the work area as a parking lot. Without enumerating all the other claims for delay, suffice it to say that the relationships between the contractor and the Government representatives deteriorated to the point that all communications between the contractor and such representatives had to be channeled through the office of the CO.

Finally the contractor and the Government representatives reached an impasse. The crisis arose over the matter of installing sheathing in the trench in which the pipe was installed. On the same date the contractor wrote to the CO concerning resumption of work, the CO sent the contractor a letter terminating the contract for default and terminating further performance under the contract.

In reaching the conclusion that there was no justification for cancelling the contract for default, the "trial commissioner" stated:

> Withal, it appears that the major reason for the termination was not the contractor's lack of diligence but

> rather its submission on January 12, 1952, of a claim for extras. * * * [*Dale Constr. Co.* v. *United States, supra,* at 720.]

The facts in the present case are somewhat analogous to those in *Dale, supra.* In the present case the contractor had a claim pending for payment of work completed and a claim for additional payment for moving material from the alternate borrow source. Also, the matter of acceptance of the boat ramp "as is" was under negotiation.

In the present case there is also evidence of antagonism between the contractor and the Government representatives. The record indicates that one Government employee with whom the contractor had difficulties was taken off the job in order that the conflict would cease.

Finally, the CO in the present case made no finding that the contractor was actually in default on any item. His only ground for termination was that there was "inadequate evidence of the diligent performance required." In further elaboration on this point, the CO stated that "some of the events and circumstances related to your failure to return to work on this project during the current work season which are cause for the termination of this contract for default" were set forth in the 10-day "cure" letter of July 23, 1969.

In a somewhat redundant and petulant manner, the CO stated in the notice of termination:

> * * * To date you have not furnished the Government with any proposed schedule of your plans for completion of this project to in any manner assure us of possible completion within the remaining contract time.

The notice went on to say:

> As of the close of business this date you have not resumed work in such a manner as to assure completion of this contract within the remaining contract time. Considering these facts, it is my determination to terminate this contract for default.

Nothing was said in the letter about payment for completed work, the acceptance of the boat ramp "as is," or

any other matters outside those referred to in the "cure" letter of July 23, 1969.

Another precedent of this court which is applicable to the present case is *Schlesinger* v. *United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968).

In *Schlesinger*, a "cure" letter was sent to the contractor which concluded with the following paragraph:

> This letter notice is your first warning concerning delinquency in deliveries of Caps, service, under the subject contract. You are requested to immediately advise the Contracting Officer the specific dates on which deliveries can be expected. Upon receipt of the information further determination will be made regarding the status of your contract.

Without making a finding that the contractor would not have been able to complete the contract within the time allowed, the Government thereafter terminated the contract for default. The Armed Services Board of Contract Appeals sustained the termination for default but the Court of Claims held that the termination should be for the convenience of the Government. It is clear from the court's opinion that the Government seized upon a technicality to terminate the contract for default, whereas exercise of sound discretion would have dictated termination for convenience of the Government under the facts in the case.

By analogy, the CO in the present case seized upon a technicality as an excuse to "get rid of the contractor." The technicality in this case, as in *Schlesinger, supra*, was the failure to submit a written schedule for completion of the work—and nothing more. Nowhere in the contract in the present case is there a provision for submission of completion schedules other than those required at the time of commencement of the work (Contract § 4.3).

The present case is readily distinguishable from those cases in which the contractor was already in default at the time of issuance of the "Notice of Termination" by the CO.[10] This is a case in which the CO *anticipated* a default but without making a determination that the contractor

[10] *See, e.g., Litchfield Mfg. Corp.* v. *United States*, 167 Ct. Cl. 604, 338 F.2d 94 (1964).

could not possibly complete the work *within the time remaining*.

Finally, the CO was not lawfully entitled to withhold payment of sums due the contractor for work completed or to pay over such sums to the bonding company where the contractor was not already in default or where there is insufficient evidence to establish that the work could not possibly be completed within the time remaining.

In *Hicks Corp.* v. *United States*, 203 Ct. Cl. 65, 487 F.2d 520 (1973), the contractor closed its plant due to lack of operating funds and thus was in default at the time of termination. Thus the CO was justified in terminating the contract for cause.

The contractor in the present case was obviously in a financial "bind." The bonding company and some creditors had made known to the Government their concern over the ability of the contractor to fulfill his financial obligations. They showed no concern, however, over the ability of the contractor to *complete the work* within the remaining time. They were only concerned about the cash flow. To this extent, the Government was at fault for deliberately withholding the amounts due the contractor for work completed. Had such amounts been paid, the concern of the bonding company and creditors of the contractor may have been alleviated or, perhaps, eliminated.

Beyond a shadow of doubt, the attitudes and actions of the CO in terminating the contract, and the Board in affirming the termination, reflect a prejudice against the contractor arising out of a pending controversy with the same contractor over another contract which was also terminated for default, but was ultimately converted to termination for convenience of the Government after appeal.[11] Indeed, the decision of the Board from which the present appeal has been taken clearly states:

> The difficulties at North Waldo experienced by appellant and for which this Board found that the Government was responsible undoubtedly had some effect upon

[11] Discount Co., AGBCA No. 291, 74-1 BCA ¶ 10,511.

appellant's difficulties in the contract which is the subject of this appeal. * * *

The fundamental error of law in the Board's decision in this case lies in its statement that:

> It is not a sufficient answer that there was adequate time left for completion. It seems clear that at the time of termination there was adequate time left for completion. * * *

The Board stated further:

> * * * There is no evidence in this appeal showing a connection between the failure to prosecute the work and financial difficulty arising out of Government action on this contract or on the contract in Appeal No. 291, *supra*.

Since there was adequate time left for completion of this contract at the time of termination and the Government not only wrongfully withheld payment of amounts due the contractor for work completed, but also wrongfully terminated the contract in Appeal No. 291, *supra*, the finding of the Board that there was no "connection between the failure to prosecute the work and financial difficulty arising out of Government action" is contrary to the evidence and is, therefore, clearly erroneous.

In its "Ruling on Motion for Reconsideration," the Board stated:

> Appellant affirmatively states that it was not prevented from performing because of any financial difficulties which were found to exist with respect to the appeal in Discount Company, AGBCA No. 291, 74–1 BCA ¶ 10,511, involving construction of the North Waldo Lake Campground. Although, the decision of the Board in this case (AGBCA No. 273) referred to those matters, the Board concluded that termination for default was warranted for other reasons. The Board specifically found that the Government was not responsible for failure of appellant to proceed diligently with prosecution of the Mona Campground and Lookout Boating Site contract.

The Board does not explain the "other reasons" for which it concluded that the termination for default was warranted in *this* case. The financial problems of the contractor appear to be the *only* reasons for the alleged

lack of progress toward completion. Some equipment was still on the site at the time of termination and there is no evidence that the contractor had gone out of business. Neither is there any evidence that any subcontractor refused to proceed with work on the site.

A cursory review of the administrative record in this case indicates that, due to the co-pendency of the appeals with respect to termination of the Waldo Lake contract and the present (Mona Campground and Lookout Boating Site) contract, the Board's decision in the present case was based on facts which would not, under applicable rules of evidence, be admissible in the present case, alone. Thus, the Board's *decision* in *this* case is not supported by *evidence* which is properly admissible in *this* case.

In view of all of the foregoing, I believe that the termination was and should be denominated as termination for convenience of the Government and not as a termination for default.

BOARD OF CONTRACT APPEALS
UNITED STATES DEPARTMENT OF AGRICULTURE

Appeal of --	)	
	)	
Discount Company	)	AGBCA No. 273
	)	
Appearances for Appellant	)	
	)	
Ralf H. Erlandson	)	
William B. Reisbeck	)	
	)	
Appearance for the Government	)	
	)	
Elden Gish	)	

OPINION BY MR. SHOUSE

This is an appeal by appellant from a termination for alleged default of Forest Service Contract 002112 which provided for construction of Mona Campground and Lookout Boating Site in the Willamette National Forest, Lake County, Oregon. The original contract price was $104,399.99. Termination was effected by notice of termination mailed to appellant on August 12, 1969.

The difficulties experienced by appellant in the contract which is the subject of this appeal paralleled in point of time difficulties which attended another contract for the construction of North Waldo Lake Campground which was terminated for alleged default and which was the subject of an appeal to this Board. The Board found that acts of the Government made it impossible for appellant to proceed with that contract and the

termination was converted to one for convenience of the Government in Appeal of Discount Company, AGBCA No. 291, 74-1 BCA Para. 10,511.

The difficulties at North Waldo experienced by appellant and for which this Board found that the Government was responsible undoubtedly had some effect upon appellant's difficulties in the contract which is the subject of this appeal. The evidence presented at the hearing of this appeal and in the record, however, show, for reasons hereinafter set forth, that the Government was amply justified in terminating contract 002112 for default and that the Government was not responsible for failure of the appellant to proceed diligently with prosecution of the contract -- the basis of termination.

Notice to proceed on construction of the Mona Campground and Lookout Boating Site was issued on June 24, 1968, and was effective on that date. Work was to be completed in 180 days. The Government concedes that progress was adequate through the 1968 season until winter shutdown in November of 1968. Work was to resume in the spring of 1969. A partial resume work order was issued effective June 25, 1969. Resumption was to be "partial" because staking had not been finished. Moreover, Mona Lake Reservoir was at a high water level and this condition continued during much of the 1969 work season (T. 59). This water level covered major portions of the boat ramp and borrow area at the time of the prework meeting of May 14, 1969 (T. 60).

Appellant was beset with difficulties from the outset. The difficulty concerning which appellant complained most vigorously was the suitability of material in a borrow pit designated for use at the Lookout Boating Site, the parking area, the boat ramp, the campground and the campground road (T. 11). The specifications in Item 51, section 1.2(b) provided:

> b: Borrow. When borrow is designated in the schedule of Items, it shall consist of the excavation of suitable unclassified material from sources listed as Case I in the plans or Supplemental specifications.

Richard Norelius, appellant's president, testified in response to a request by his counsel that he explain his understanding of "Case I Borrow source":

> Case I Borrow source is that all material within the area described is usable. (T. 11).

Appellant by letter dated July 31, 1968 (appellant's Exhibit 24), requested a change order with 87 cents increase per cubic yard for removal of unsuitable material as required by Work Order 2.

The Government never accepted appellant's definition of Case I borrow and has referred to the language of the contract and commonly accepted usage of this term. There is no basis for appellant's position that "Case I borrow source" is to be interpreted as all usable. Quite the contrary. In Allied Contractors, Inc., 1964 BCA Para. 4379, the

contractor was denied an equitable adjustment for Case I borrow which had been claimed on the basis that it included large quantities of clay which were unusable.

In describing the meaning of Case I borrow source, William H. Roth, the Contracting Officer Administrative Representative (COAR), testified:

> Referring to the specifications which are in the contract itself, and this is the only basis on which we operated, the Case I source indicates that there is a sufficient amount of suitable material within the designated area. It does not guarantee that all material in the Case I source is suitable, it just states there is a sufficient amount for the project.
>
> On that basis we felt that the contractor should proceed with his operation. There was no need to designate an alternate source.
>
> On each occasion, on several occasions I asked the contractor if he felt the amount of debris within the borrow source was more than could normally be anticipated in his estimation, I would be more than happy to consider a claim if he would submit it in the manner in which it could be ruled on, explaining the amount of time involved, his cost of operation and so on and so forth a complete explanation of his problem. (T. 157, 158).

The testimony at the hearing indicated that there was a substantial amount of unusable material which had to be separated from the usable material (T. 13-18). An alternate borrow source was designated and appellant's impression that no payment would be made for costs of hauling to the Lookout boat landing if its use became necessary was corrected. Actually the completing contractor did not have to resort to the alternate

source for the Lookout boating site and landing ramp parking area since there was adequate usable borrow at the first source.

Upon consideration of a claim based on a changed condition because of unsuitable material, the contracting officer determined on November 7, 1968, that there was no changed condition and denied appellant's claim for an increase of $.87 per cubic yard for all borrow material.

In a reconsideration of a claim submitted by the completing contractor for extra costs because of unsuitable borrow, the claim was settled on the basis of 17.25 cents per cubic yard (T. 29).

A memorandum dated December 3, 1969 (four months after termination of the contract), from the contracting officer to the Regional Attorney, USDA, says in part:

> After consideration of the contractor's two claims as stated and in agreement with the evidence in the Contracting Officer's Findings and Decision, I have determined that there did exist a changed condition in the borrow pit area at the time of award of this contract consisting of an unknown physical condition, of an unusual nature, differing materially from that ordinarily encountered in borrow pits. Specifically, the changed condition consisted of debris in the over burden and unsuitable material in the borrow material in an amount in excess of that which was known or expected by the Government in its estimate or could have been reasonably anticipated by the contractor in his bid. This excess debris and unsuitable material did result in an increase in the contractor's cost of performing Item 51(2) borrow under the contract.

> It has been determined that an increase in the unit price of $0.17-½ per cubic yard for the 6,061 cubic yards placed under this item is an equitable adjustment for the increased costs to the contractor. Counsel for the surety has agreed with determination and has indicated they will accept this adjustment as full settlement of the claim under Appeal No. 273.

Except for the later determination by the contracting officer, and the equitable adjustment made with the surety, the evidence introduced at the hearing is not convincing that an actual changed condition existed. Certainly some unsuitable material is to be expected in a borrow source of this kind. An alternate borrow source was designated before the beginning of the 1969 work season, but was not used by the completing contractor for the Lookout landing site and parking area.

COAR Roth testified that, looking at the matter from hindsight, he would not have issued a change order for another borrow site since there was adequate borrow in the Case I source pit designated, it was the most convenient source, and the boat ramp and parking lot were completed from that source (T. 185). Continuing, Mr. Roth said:

> As to the amount of debris within the source, the contract provides for procedures, it does provide relief to the contractor if he wants to proceed with claims and so forth if he felt he was being damaged, if he felt this was - - as was pointed out in the letter to him, if he had any evidence to support his request, this would be honored. The procedures were in the contract to handle this sort of situation. (T. 186).

As stated in our decision with regard to appellant's other appeal (Discount Company, AGBCA No. 291, 74-1 BCA Para. 10,511), a contractor

who has a claim for equitable adjustment may not, regardless of its validity or invalidity, fold his hands and sit idly by while a Wunderlich Act type dispute is being resolved pursuant to the Disputes article. The article requires:

> Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

While the Board ruled in its decision with regard to the other appeal, AGBCA No. 291, supra, that the Government's acts made performance under the contract there involved impossible, we are unable to find that the same condition existed here. Except for the plumbing work by a sub-contractor, appellant performed little work after being given a partial resumption order on June 25, 1969 (appellant's Exhibit 13), or after receiving a full resumption order effective July 15, 1969 (appellant's Exhibit 14-A).

It is not a sufficient answer that there was adequate time left for completion. It seems clear that at the time of termination there was adequate time left for completion. The evidence is equally clear that the contracting officer was justifiably concerned that, notwithstanding repeated warnings, appellant was making no real effort to resume work in 1969.

In a letter dated July 23, 1969, the appellant was reminded that a partial resumption notice was issued on June 2, 1969, with the limitations thereof having been explained at a meeting on May 14, 1969. Appellant was informed that the only construction work performed since the May 14 meeting had been installation of a septic tank and drain field by the subcontractor. Appellant was warned that if work was not resumed within ten calendar days with such diligence as would insure completion, notice would be given of termination of right to proceed to be followed by termination of the contract for default.

The appellant was notified of termination of the contract for default on August 12, 1969.

Subsequent to expiration of the cure notice on August 3, 1969, COAR Roth met appellant's president at the site. In a memorandum of the meeting, which was introduced as Government's Exhibit 8, Mr. Roth noted that he attempted without success for approximately one hour to get a firm commitment from appellant's president, Richard Norelius, as to plans for equipment and manpower and his schedule for completion of the project.

Mr. Norelius stated that he was hesitant to make any commitments in resuming work "because he did not know what the Forest Service planned in regard to termination." Mr. Roth continued:

> I advised Mr. Norelius very emphatically that the Government's position was that we expected him to complete the contract and we desired him to complete the contract but we expected this to be done within the terms of the contract and within the allowable time. If he hesitated to resume work and thereby jeopardize completion, we would have no alternative other than to proceed with the termination.

Inasmuch as nothing further had been done by appellant as of the date of termination, the Board finds that termination for default was fully warranted.

Appellant makes other assertions about lack of staking, but it does not appear that progress was impeded by this factor. The evidence shows clearly that material obtained from the original Case I source for construction of the boat ramp and parking lot areas was placed in a manner not conforming with specifications. The contract specifications required that the material be placed in layers not to exceed 24 inches before compaction, and that hauling and spreading equipment would be operated over the full width of each layer (Contract Specifications Item 51, Sections 3.10 and 3.11). The method employed by appellant was to use a truck and a loader which dumped the material five to seven feet high. After a large area had been covered with these piles as illustrated in photographs (Government's Exhibits 3 & 4), the piles were knocked over with a cat. The resultant material lay some five feet or more in depth (Hickey, T. 160-162).

The Government finally decided to accept the work on an "as is" basis - a practical solution which does not refute the clear evidence of work accepted which was far from conforming with contract requirements.

An inability to achieve timely performance because of heavy losses on another contract is not of itself excusable. Appeal of Wood Mfg. Inc., ASBCA 9640, 65-2 BCA 4972 (1965); Appeal of Fabricated Products, Inc., ASBCA 9631, 64 BCA 4450 (1964); H & H Mfg. Co., Inc. v. United States, 168 Ct. Cl. 873 (1964).

Where two or more causes of delay coincide, one the result of Government fault and the other not excusable, neither party may recover against the other. Appeal of Vector Plastics Corp., ASBCA 9552, 65-2 BCA 5286 (1965). See also Commerce International Co., Inc. v. United States, 167 Ct. Cl. 529 (1964).

Even should payment be arbitrarily declined, the contractor must still prove that he was delayed thereby. Appeal of Wiggins, ASBCA 4022 & 4613, 58-1 BCA 1644 (1958). There is no evidence in this appeal showing a connection between the failure to prosecute the work and financial difficulty arising out of Government action on this contract or on the contract in Appeal No. 291, supra.

The Board concludes that the termination for default was warranted. The appeal is denied.

John H. Shouse

John H. Shouse, Acting Chairman

Concurring:

Paul H. Rapp

Paul H. Rapp, Member

Paul E. Nylander

Paul E. Nylander, Member

Issued June 25, 1974.

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1977

DISCOUNT COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BARBARA ALLEN BABCOCK,
Assistant Attorney General,

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1) is reported at 554 F. 2d 435. The opinion of the Department of Agriculture Board of Contract Appeals (Pet. App. A-2) is reported at 74-2 BCA para. 10,775. The Board's opinion on denial of motion for reconsideration is reported at 74-2 BCA para. 10,855.

JURISDICTION

The judgment of the Court of Claims was entered on April 20, 1977, and a timely motion for rehearing was denied on May 27, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the decision of the Board of Contract Appeals that petitioner's contract was properly terminated for default was supported by substantial evidence.

STATEMENT

This suit arose under the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321-322, for review of a decision by the Department of Agriculture Board of Contract Appeals holding that the termination of petitioner's contract for default was proper. Petitioner seeks review of the Court of Claims' decision granting summary judgment in favor of the government.

The facts are set forth in the opinion of the Court of Claims (Pet. App. A-1, pp. 2-3). In May 1968, petitioner entered into a contract with the Forest Service to construct a boat launching ramp, parking lot, and campgrounds at what was to be the Mona Campground and Lookout Boating Site in the Willamette National Forest, Oregon. The notice to proceed was issued on June 24, 1968 and construction was to be completed within 180 days. Petitioner initiated construction, but by October 1968 the contracting officer had decided that petitioner's work in the parking area and boat ramp did not comply with specifications because of unsuitable materials and construction methods. In December 1968, work was suspended due to winter weather.

Prior to the resumption of work for the 1969 season, petitioner and the government's representative had two conferences to plan the remaining work under the contract. Because the boat ramp area would be partially covered by the rising water level of Lake Mona Reservoir during the contruction season, petitioner agreed to wait

until September 1969 to work on the unacceptable structures.[1] Petitioner also agreed to begin construction at the campground on June 2, 1969, since it was not affected by the rising water level. On June 2, the contracting officer submitted to petitioner Change Order No. 3, which designated an alternative borrow site,[2] and also gave petitioner a partial work resumption order for the campground construction. Petitioner refused to sign the order on June 10, 1969, alleging that problems with the government's restaking of the area and certain other difficulties prevented it from proceeding. The work order was reissued on June 24, 1969. Nevertheless, petitioner did not begin work on the campground.

On July 18, 1969, Change Order No. 5 was issued effecting a negotiated "as is" acceptance of the nonconforming boat ramp and parking lot. On July 14, 1969, the Forest Service had issued a full work resumption order, effective July 15, which anticipated the "as is" acceptance and required work to resume on all other phases of the project, particularly the campground. However, petitioner did no substantial amount of work on the job site during the summer of 1969.

Because of this lack of progress, the Forest Service, on July 23, 1969, sent petitioner a ten-day cure notice demanding that work be resumed with such diligence as to insure the project's completion within the contractual time remaining. Since petitioner failed to resume work

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[1]Contrary to its assertions, petitioner has never pointed to any evidence in the administrative record to show that it had requested work resumption earlier than June 1969.

[2]A "brorrow site" is a place from which fill material may be removed. The original borrow site designated in the contract apparently had become partially covered by water from the reservoir.

and did not provide a requested schedule for completion of the remaining work, the contract was terminated for default on August 12, 1969.[3]

On petitioner's appeal from the default termination, the Agriculture Department Board of Contract Appeals found that petitioner failed to perform sufficient work during the summer of 1969 to assure completion of the project within the contractual time, that this failure was unexcused, and that the default termination accordingly was justified (Pet. App. A-2).

The Court of Claims, with one judge dissenting, granted summary judgment in favor of the government, holding (Pet. App. A-1, pp. 4-5; footnote omitted):

> * * * the record demonstrates that the Board could allowably find that, despite two resumption-of-work orders and plaintiff's assurances that work would soon resume, no substantial progress was actually made on campground construction during the 1969 work season. As of August 4, 1969—weeks after the order to resume work had been issued and a day after the 10-day notice had expired— plaintiff had neither begun more-than-piddling construction activities at the campground, nor assured the Government that it could meet the completion deadline * * *. Discount did do some minor work on other aspects (*e.g.* on a

[3]A further dispute between the parties arose in June 1969 when the government submitted Payment Invoice No. 6 representing the estimated amount due for work performed the previous year. Petitioner disagreed with the estimated percentage of the work completed and refused to sign; when the parties finally agreed on August 4 as to the amount due, petitioner was in default of the ten-day cure notice, and the government decided that the contract was likely to be terminated. Accordingly, payment was withheld to protect the surety (Pet. App. A-1, p. 4).

> waterline and some plumbing) but there is very little doubt that it performed little or nothing on the central component—the clearing and grading of the campground.

ARGUMENT

The essentially factual question presented here, whether petitioner had adequate justification for its failure to make progress on the contract, raises no issue of general importance and does not warrant further review.

1. Petitioner argues first (Pet. 7-11) that Change Order No. 3 designating an alternative borrow site was merely a proposal that it did not accept[4], that a further unilateral order by the contracting officer was necessary before the change could become effective, and that had it used the alternative site without such an order, it would have waived its right to an equitable adjustment. The Court of Claims correctly dismissed this contention as "wholly divorced from the realities of the situation" (Pet. App. A-1, p. 7). The designation of an alternative borrow site was not even among the reasons mentioned by petitioner when it refused to sign the partial work resumption notice on June 10, 1969 (App. Exh. 8).[5] Furthermore, petitioner signed the work resumption notice on June 24 (App.

[4]Petitioner returned the change order unsigned, claiming that it should include an upward adjustment for higher transportation costs (Pet. App. A-1, p. 6).

[5]App. Exh. refers to the exhibits attached to Defendant's Request for Review of Trial Judge's Recommended Decision and Conclusions of Law, filed in the Court of Claims, a copy of which is being lodged with this Court.

Exhs. 7, 9), with no reservation regarding the borrow site.[6] As the Court of Claims noted (Pet. App. A-1, p. 7):

> * * * plaintiff was aware, or should have known, that it could have protected its right to an equitable adjustment by simply saying so—that it would comply with Change Order Number 3 but would still pursue its alleged right to an increase in the contract price.[7] Plaintiff never asked for the additional unilateral order it now calls an absolute prerequisite, nor did it tell defendant, when it was being repeatedly pressed in the summer of 1969 to proceed with the

[6]Contrary to petitioner's contention (Pet. 15-17), the finding of the Court of Claims that the alternate borrow site was adequate is not clearly erroneous. The opinion of the completing contractor was that the material was unsuitable, but the government's engineers disagreed (Tr. 173, 173-A). ("Tr." refers to the transcript of proceedings before the Agriculture Department Board of Contract Appeals.) In any case, at the pre-work conference on May 14, 1969, the alternate site was examined and no objection was made by petitioner (App. Exh. 14). Petitioner's subsequent objection to the alternate site was not based on the ground that it was unusable, but on possible higher transportation costs (Pet. App. A-1, p. 6), and the contracting officer's administrative representative testified that beginning on or about June 23, 1969, all phases of the project were open to petitioner to resume work, with the possible exception of burning operations (Tr. 183).

[7]Petitioner contends (Pet. 11) that this statement fails to recognize an alleged policy of federal procurement agencies to attempt to negotiate bilateral changes before resorting to the power under the changes clauses. The record before the Board contains no evidence of such a policy. To the contrary, Article 3(b) of the Supplemental General Provisions of the contract provides that any written or oral order from the contracting officer causing a change "shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order."

> work, that the main obstacle was that it could not safely use the alternate borrow site without such an additional order.

The Court of Claims correctly concluded that "this excuse, the major one proffered us, is an afterthought, not a real justification for failing to proceed with the campground work in the 1969 summer" (Pet. App. A-1, p. 7).

2. Petitioner also contends (Pet. 11-13) that it was justified in failing to make progress because of alleged wrongful withholding of progress payments. But this, too, is an entirely abstract claim. The Board determined that there was no evidence before it showing a connection between the failure to prosecute the work and financial difficulty arising out of government action on the contract (Pet. App. A-1, p. 9). The Court of Claims noted that "Discount did not directly contend, either in its brief or on oral argument before us, that the Government's failure to pay the full amount requested by plaintiff [under Payment Invoice No. 6] precluded it from proceeding during the 1969 construction season" (Pet. App. A-1, p. 9). Indeed, petitioner does not contend in this Court that there is an actual causal relationship between the withholding and its inability to perform. The Court of Claims correctly concluded (*ibid.*): "The non-payment here was not as a result of the Government's wrongful withholding of money clearly due but rather resulted from a good faith controversy, which was handled through appropriate channels, over the amount owed." See also *Litchfield Mfg. Corp.* v. *United States*, 338 F. 2d 94 (Ct. Cl.).[8]

[8]Although petitioner contends (Pet. 12) that the Court of Claims erroneously decided that the government was justified in withholding the amount agreed upon as due for the benefit of the surety, the court

3. Petitioner erroneously states (Pet. 14) that the termination was wrongful because "[a]ll parties * * * recognized that adequate time remained under the contract for its timely completion." The government has not conceded that petitioner had the ability to complete performance on time (Tr. 182) and no such finding was made. In any case, petitioner's claims regarding the possibility of timely completion are irrelevant, since the contract was terminated for lack of diligence, not impossibility of completion (Pet. App. A-1, p. 8).[9]

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actually found it unnecessary to decide this issue since, as it correctly observed, "* * * the failure to pay after August 4th did not trigger plaintiff's default * * *" (Pet. App. A-1, pp. 9-10).

[9]Thus, contrary to the understanding of the trial judge (and apparently the dissenting judge in the Court of Claims), petitioner was not terminated for a technical failure to provide a work schedule but "on the over-all evidence of Discount's failure to prosecute diligently its work under the contract" (Pet. App. A-1, p. 8). As the court pointed out (*ibid.*), once lack of diligence has been found, it is proper "to rely upon cases involving abandoned or repudiated contracts, as well as other decisions similar to the one at bar which have upheld 'failure to make progress' terminations. See, *e.g.*, *Universal Fiberglass Corp.* v. *United States*, 210 Ct. Cl.___, 537 F. 2d 393 (1976); *American Dredging Co.*, ENGBCA 2920, 72-1 BCA para. 9316, aff'd, 207 Ct. Cl. 1010 (1975)." Contrary to petitioner's assertions (Pet. 14), neither decision relied upon by the court interpreted a termination clause like that involved here to permit termination only if performance within the contract period was literally impossible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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